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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GENITH A. DOUGLAS,
Petitioner,

v.

TRAVELERS INNS OF NORTH WILKESBORO, INC., d/b/a HOLIDAY INN OF WILKESBORO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW:

WHETHER THE EMPLOYER'S BURDEN OF PROOF WITH RESPECT TO THE 'REASONABLE ACCOMMODATION' DEFENSE UNDER SECTION 701(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 REQUIRES THE EMPLOYER TO PROVE AN ACTUAL UNDUE HARDSHIP INSTEAD OF MERELY TO ARTICULATE A POTENTIAL UNDUE HARDSHIP.

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Niderhuber v. Camden County Vocational and Technical School District Bd. of Education, 495 F. Supp. 273(D. N.J. 1980), aff'd 671 F. 2d 496 (3rd Cir. 1980).

Nottelson v. Smith Steelworkers, 643 F. 2d 445(7th Cir. 1981).

Redmond v. GAF Corp., 574 F. 2d 897(7th Cir. 1978).

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Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113(1977).

STATUTES:

Title VII of the Civil Rights Act of 1964

OTHER AUTHORITIES:
91 Har. L. Rev. 70(1977).

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On Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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1. OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina,

at caption number C-79-370-W was entered on December 14, 1983, and is attached in the Supplemental Appendix. The opinion of the United States Court of Appeals for the Fourth Circuit, at caption number 84-1071 was entered on April 5, 1985, and is attached in the Supplemental Appendix.

2. JURISDICTION

The United States District Court for the Middle District of North Carolina entered its judgment and Memorandum Opinion on December 14, 1983. The decision of the United States Court of Appeals for the Fourth Circuit was entered on April 5, 1985. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit

is conferred by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et. seq. and by 28 U.S.C. §1331.

3. QUESTION PRESENTED FOR REVIEW:

WHETHER THE EMPLOYER'S BURDEN OF PROOF WITH RESPECT TO THE 'REASONABLE ACCOMMODATION' DEFENSE UNDER SECTION 701(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 REQUIRES THE EMPLOYER TO PROVE AN ACTUAL UNDUE HARDSHIP INSTEAD OF MERELY TO ARTICULATE A POTENTIAL UNDUE HARDSHIP.

4. STATUTORY PROVISIONS INVOLVED

The case involves Section 701(j) of Title VII of the Civil Rights Act of 1964(42 U.S.C. Section 2000e(j)), which states:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The case also involves Section 703(a) of Title VII of the Civil Rights Act of 1964(42 U.S.C. Section 2000e-2(a)(1)), which states:

> It shall be an unlawful employment practice for an employer: (1) to fail to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions,

or privileges of employment, because of such individuals race, color, religion, sex, or national origin.

5. STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et. seq. and under 28 U.S.C. § 1331.

The petitioner, Genith A. Douglas, was employed by Travelers Inns of North Wilkesboro, Inc. at its Holiday Inn in Wilkesboro, North Carolina on December 25, 1972. She worked there as a cook until her discharge on May 28, 1975. At the time that Genith Douglas was employed by the respondent in 1972, she informed the Company that she could not work on

Sunday, her Sabbath day, because it was against her religious beliefs. She was told by Hazel Miller, the food supervisor who hired her, that every employee had at least one day off a week, and that her schedule would be set up so that she would not have to work on Sunday. (Trial Transcript, p. 17) From December 25, 1972 until May, 1975, Genith Douglas did not have to work on Sunday. In May, 1975, Jimmy Kirkman, the innkeeper, approached her and requested that she work on two successive Sundays. He represented to her that he had just lost one of his Sunday cooks. She told him that it was against her religious beliefs to work on her Sabbath. He represented to her that if she would agree to work on those two successive Sundays, he would never ask her to violate her religious be-

liefs again. Mrs. Douglas agreed and did in fact work the requested two successive Sundays. (Trial Transcript, pp. 40 - 42) Immediately thereafter, the respondent hired two new employees. Robert Grady was hired as a cook and food and beverage director on May 20, 1975, and Louise Carson was hired as a cook on May 28, 1975. On May 28, 1975, after the respondent had hired these two new cooks, Jimmy Kirkman, the innkeeper, told Genith Douglas that she would have to work every other Sunday in the future. When she protested, he told her that she would do it or "that's it." Genith Douglas considered herself to be constructively discharged on May 28, 1975. (Trial Transcript, pp. 40-46, p. 295) At this time, there were

seven other cooks who were available to work on Sundays who had no religious conflicts, and none of them were ever consulted or asked by the respondent about working on these Sundays. (Plaintiff's Exhibit No. 29) Louise Carson and Robert Grady could have alternated as cooks every other Sunday. (Trial Transcript, p. 282) Genith Douglas was the only employee of the respondent who ever voiced any objections, religious or otherwise, to working on Sunday. (Trial Transcript, p. 282) During this time period, the business at this Holiday Inn had substantially lessened. After Genith Douglas was constructively discharge, she learned that the respondent had in fact not lost a Sunday cook, as had initially been represented to her

by Jimmy Kirkman to induce her to violate her religious beliefs.[1] (Trial Transcript, p. 292)

[1] At trial, plaintiff's Exhibit No. 29 was introduced into evidence, which is Defendant's Answers to Plaintiff's Interrogatories. This lists all of the employees at the Holiday Inn in Wilkesboro during Genith Douglas' employment, and the dates of their employment. The Exhibit shows that no cooks left the employ of the defendant right before Genith Douglas was forced to work on Sunday.

I. THE EMPLOYER'S BURDEN OF PROOF WITH RESPECT TO THE 'REASONABLE ACCOMMODATION' DEFENSE UNDER SECTION 701(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 REQUIRES THE EMPLOYER TO PROVE AN ACTUAL UNDUE HARDSHIP INSTEAD OF MERELY TO ARTICULATE A POTENTIAL UNDUE HARDSHIP.

Section 701(j) of the Civil Rights Act of 1964 as amended in 1972 defined the term 'religion' as follows:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113(1977), this Court defined the scope of the employer's duty to accommodate

the religious beliefs of the employee without undue hardship to be limited to de minimis cost. The events at issue in Hardison, supra. occurred before the 1972 amendments were enacted, and the 1967 E.E.O.C. regulations calling for 'reasonable accommodation' were considered and interpreted as a construction of pre-1972 law. Central to the decision in Hardison was the application of Section 703(h) of Title VII. Noting that bona fide seniority systems are afforded special treatment under Title VII, the Hardison case turned on the circumstance that an accommodation of an employee who refused to work on Saturdays would have amounted to a breach of the company's collective bargaining agreement with a labor union.

A central issue which was not addressed by this Court in Hardison is whether the employer's

burden of proof with respect to the "reasonable accommodation" defense under Section 701(j) of Title VII of the Civil Rights Act of 1964 requires the employer to prove an actual undue hardship or merely to articulate a potential undue hardship. Since this Court decided the Hardison case in 1977, it has not accepted any case for review addressing religious discrimination under Title VII. During the last eight years since Hardison, the circuit courts in addressing religious discrimination cases and the application of Hardison to those cases have noticeably and clearly split in their decisions with respect to the issue raised in this petition. Although the standard of undue hardship was defined as "de minimis" in Hardison, the scope and meaning of the de minimis standard is far from clear. Because

of the uncertainty of that standard, it has become evident in the last eight years that this Court needs to clarify and refine the defendant's burden of proof as it relates to the de minimis standard.

The issue presented above presents a question of major importance for this Court and involves an issue of federal statutory interpretation and refinement. The Supreme Court, 1976 Term, 91 Har. L. Rev. 70 (1977) stated at p. 273:

> Taken literally, the deminimis standard renders all but the most trivial accommodations, even if easily accomplished and inexpensive, impermissible despite an express congressional intent to require such accommodations. Further, the Court hinted that it may be willing uncritically to accept employer assessments of costs based upon the notion that if an accommodation is made for one it will have to be made for many. While aggregation of the costs of

> a given dispensation is clearly proper to assess the total impact upon an employer's operation, the burden of showing the cost of each individual accommodation, the total number of such accommodation likely to be required, and the resulting aggregate impact should rest upon the defendant, who is in the best position to obtain necessary information, and who, if the congressional mandate is to be followed, ought to bear the burden of showing a particular dispensation to be reasonable.

In Haring v. Blumenthal, 471 F. Supp. 1172(D. DC., 1979), cert. den. 452 U.S. 939, 101 S. Ct. 3082, L. Ed. 2d (1981) reh. den. 453 U.S. 927, 102 S. Ct. 890, L. Ed. (1981), the Court addressed the same issue in a similar manner at p. 1181:

> Other decisions by lower courts have sometimes held for and sometimes against the complaining employee, depending upon particular facts and circumstances, but generally they have failed to explore what appears to be the

> critical issue: whether the level of hardship must be measured by accommodation of the one employee seeking relief or by the precedent-setting effect of the grant of such relief to him and the conceivable actions of others.

The critical distinction between whether the defendant's burden of proof under Section 701(j) of Title VII involves proof of actual undue hardship or potential undue hardship has in fact become the critical issue which is unclear in the religious discrimination area. This important issue needs to be definitively addressed and answered by this Court. Nowhere is this more evident than the realization of the marked difference between the federal circuit courts on this question. The United States Court of Appeals for the Fourth Circuit in the instant case and in Jordan v. NCNB, 565 F. 2d

72(4th Cir. 1977) has answered this issue differently from the Third, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits. Because of this split in the circuits on this important issue in the religious discrimination area, this issue should be accepted for review by the Supreme Court of the United States.

In the instant case, the United States Court of Appeals for the Fourth Circuit affirmed the District Court, which had based its decision of reasonable accommodation and undue hardship completely on what it perceived to be potential or hypothetical undue hardship. The District Court stated in pertinent part:

> If Travelers Inns were required to strictly abide by the plaintiff's demands, it would create extra expense to accommodate not only

> Ms. Douglas, but any other employee who might be affected by such a concession. And, where an accommodation would impose more than a de minimus cost in lost efficiency, or which would be an imposition on co-workers tantamount to reverse discrimination against them, an undue hardship would lie.

Although the employer, Travelers Inns of North Wilkesboro, Inc. presented no evidence that it would sustain any increased costs from accommodating the religious beliefs of the employee, Genith Douglas, and made no attempt to quantify any concomitant cost increase or to show the aggregate impact on its operation, the District Court on its own based its decision on hypothetical or potential hardships that it perceived. The hardships that it perceived, i.e. that other employees might want the same concessions, that there might be lost efficiency, and that

to accommodate Mrs. Douglas would constitute reverse discrimination against co-workers were all hypothetical. The reasons advanced for finding undue hardship in the instant case by the District Court could be said to always be present in every religious discrimination case. A decision based on potential undue hardships would arguably render Section 701(j) meaningless. As the dissenting opinion in Hardison noted:

> But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signify nothing.'

In Jordan v. North Carolina National Bank, 565 F. 2d 72(4th Cir. 1977), the United States Court of Appeals for the

Fourth Circuit again based its decision of "undue hardship" on hypothetical hardships. In that case, the employee Jordan sought reemployment at North Carolina National Bank. She had become a Seventh Day Adventist during the interim between her first employment and her subsequent application for reemployment. She informed the Bank that she would not be able to work on Saturdays because of her religious beliefs. Although the Fourth Circuit termed the employee's request not to work on Saturday a "guarantee," it based its decision against the employee solely on potential hardships. Holding that the Bank could not reasonably accommodate the demand of the employee without undue hardship, the Court held at p. 76:

> Moreover, the grant of this guarantee to Jordan would obligate the bank to provide it for all of its employees and entail extra expense. This would constitute an "undue hardship," as the Court noted in Trans World Airlines v. Hardison, 432 U.S. at 84, fn. 15, 97 S. Ct. 2264.

The dissenting opinion in Jordan (J. Winter, dissenting) made the dichotomy between potential undue hardship vis-a-vis actual undue hardship clear at p. 78:

> Subsidiary to its condemnation of the 'guarantee', the majority asserts that granting it would obligate the Bank to provide it for all of its employees and entail extra expense. This, the majority concludes, would constitute "undue hardship," citing Trans World Airlines, 432 U.S. at 84, n. 15, 97 S.Ct. 2264. The record is barren of any evidence to show that, if plaintiff's religious beliefs were accommodated, how many, if any, of the religious beliefs of other em-

> ployees would require similar accommodation, and what extra expense, if any, to the Bank would be incurred. Since there is no support in the record for the assertion, I must presume that the majority reaches this conclusion as a matter of law (not fact) on its reading of footnote 15 in Trans World Airlines. If so, I disagree that footnote 15 may be so read.

Likewise, in the instant case, the employer produced absolutely no evidence of any increased costs or financial harm it would suffer if it accommodated Mrs. Douglas' religious beliefs. In fact, the record is undisputed that she worked for Travelers Inns of North Wilkesboro, Inc. for two and one-half years without said employer ever complaining of any problems. As in Jordan, the decision of the District Court and Fourth Circuit in the instant case must be read as those courts concluding as

a matter of law that to reasonably accommodate Mrs. Douglas' beliefs would entail "undue hardship" based purely on a hypothetical basis.

The other circuit courts which have considered this issue have basically refused to lower the employer's burden of proof under Section 701(j) of Title VII to merely articulating a potential hardship, but have required proof of actual undue hardship. In Haring, supra., the Court held at p. 1182:

> In the absence of any authoritative guidance, it seems to this Court that 'undue hardship' must mean present undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's coworkers, even the most minute ac-

commodation could be calculated to reach that level.

The Court in Haring concluded at p. 1182:

> Unless the statutory mandate is to be rendered meaningless, it must be held to provide that until facts or circumstances arise from which it may be concluded that there can no longer be an accommodation without undue hardship, the employee's religious practices are required to be tolerated. This Court is not prepared to adopt a construction which would emasculate this law designed to protect religious liberty and the free exercise of religious practices and, to the extent that any of the decisions cited in note 25 supra. may be construed as calling for such an interpretation, I decline to follow them.

Not only do the decisions of the Fourth Circuit conflict with the District of Columbia Circuit on this issue, but the Seventh Circuit decisions are also to the contrary. The case of Redmond v. GAF Corp., 574 F. 2d

897(7th Cir. 1978) is strikingly similar to the case of Genith Douglas. In Redmond, supra., the employee Redmond had been employed at GAF Corporation for many years and had been a Jehovah's Witness most of that time. In 1974, the employee's Bible study class at his church of which he was in charge, was changed by the Body of Elders to Saturday morning. The employer infrequently scheduled overtime on Saturday, and this created a conflict for the first time between the Saturday work schedule and the employee's religious practices. Redmond informed his employer that he could not work on Saturdays because of his religious practices. Just as in the case of Genith Douglas, Redmond was told that he would have to work on Saturdays "or else." When Redmond stated

that he would have to follow the dictates of his religion, he was terminated. The Court noted that the employer had not introduced evidence showing a loss of efficiency, that other employees were capable of doing the unskilled work on Saturday, that other employees were already receiving premium wages for working on Saturday, and there was no union or collective bargining agreement which would present any problem in shifting plaintiff's schedule. The Court in Redmond explained the employers' ultimatum as not being an acceptable option at p. 903:

> We note that there was no discussion during this meeting of an alternative way of solving the problem other than Mr. Redmond agreeing to work on Saturday. There was no discussion of the possibility of transferring him to another job to eliminate this con-

> flict. The only alternative given to Redmond was to agree to work on Saturday or lose his job. GAF made "no effort to accommodate" Redmond.

In Redmond, the Seventh Circuit held the employer's burden of proof to that of proving actual undue hardship. Likewise, in Nottelson v. Smith Steelworkers, 643 F. 2d 445(7th Cir. 1981), the Seventh Circuit rejected the Union's argument of hypothetical hardship. The Union admitted that its fear of a "steam-roller effect" was purely conjectural and that no other employee had sought such an accommodation. The Court concluded that: "The record shows that the Union in fact flatly refused to make any accommodation and at trial failed to

present any evidence of undue hardship."

Id. at p. 452.

Moreover, the decisions of the Eighth and Ninth Circuits are also in conflict with the Fourth Circuit on this issue. Brown v. General Motors Corp., 601 F. 2d 956(8th Cir. 1979) involved an employee who had worked for General Motors for two years when he became a member of the Worldwide Church of God, which believed as one of the tenents of this religion that members were not to engage in employment on the Sabbath. Two years later because of a workforce reduction, Brown was transferred to another shift, which resulted in him being scheduled to work on his Sabbath. He was terminated for refusing to work on his

Sabbath day. The same reasons of perceived or potential hardships were advanced by the District Court in ruling for General Motors. The Eighth Circuit reversed and expressly rejected the position that hypothetical hardships conceived by the District Court weresufficient to prove undue hardship. The arguments made by the District Court were the same arguments postulated by the District Court and Fourth Circuit in the Genith Douglas case and in Jordan. The Eighth Circuit stated at pp. 960-961:

> Initially we note that §2000e-2(a)(1) does not require an employer to reasonably accommodate the purely personal preferences of its employees. Accordingly, the costs which GM would bear resulting from accommodating Brown do not include excusing vast numbers of employees

> who wish to have Friday night off for secular reasons. With regard to the possibility that numerous individuals sharing Brown's religious beliefs would desire to be excused and therefore place some actual burden constituting an undue hardship on GM, the record reflects that only four other Sabbatarians were working on the second shift out of a total work force of 1200-1500. GM made no attempt to show whether accommodation of these employees would give rise to any costs or what the actual aggregated impact of accommodating these employees would be. Instead, GM seems content to speculate on the future impact of accommodating Brown. Such speculation is clearly not sufficient to discharge GM's burden of proving undue hardship.

Finally, the Eighth Circuit in Brown, supra. refused to read Footnote 15 in Hardison restrictively, when it noted at pp. 961-962:

> The district court's final concern was that accommodating Brown would in effect discriminate against

> all employees who did not adhere to Brown's religion. We cannot agree with this interpretation of Hardison. Such an application of Hardison would provide a per se proscription against any and all forms of differential treatment based on religion. The trial court relied on the following language contained in Hardison:(footnote 15, Hardison, supra. at 84.) Carried to its logical conclusion the court's application of the quoted language would preclude all forms of accommodation and defeat the very purpose behind §2000e(j).

Likewise, the Ninth Circuit has also rejected the undue hardship standard as being based on potential hardships. See Anderson v. General Dynamics Convair Aerospace Div., 589 F. 2d 397(9th Cir. 1979); Burns v. Southern Pacific Transportation Co., 589 F. 2d 403(9th Cir., 1978) cert. den. 439 U.S.

1072, 99 S. Ct. 843, 59 L. Ed. 2d 38(1979); Tooley v. Martin-Marietta Corp., 648 F. 2d 1239(9th Cir. 1981) cert. denied, 454U.S. 1098 (1981). In Anderson, supra., the Ninth Circuit explained the underlying rationale for requiring the employer's burden of proof of undue hardship to be based on proof of actual hardship at p. 402:

> Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'

Finally, the Fourth Circuit decisions are in conflict with decisions of the Third Circuit and Sixth Circuit on this question. In Niderhuber

v. Camden County Vocational & Technical School Dist. Bd. of Education, 495 F. Supp. 273(D. N. J. 1980), aff'd 671 F. 2d 496(3rd Cir. 1980), the Court rejected the hypothetical hardship standard at p. 280:

> Clearly, if the mere assertion by employers that accommodating the beliefs of one employee will cause undue hardship by forcing them to accommodate the beliefs of all its employees were sufficient, by itself, to relieve them of the duty of accommodation, then 'no employer would ever be required to accommodate any religious belief of any employee.'

The United States Court of Appeals for the Sixth Circuit in Draper v. United States Pipe & Foundry Co., 527 F. 2d 515(6th Cir. 1975) also rejected the hypothetical hardship standard at p. 520:

> We may assume that any accommodation would entail some hardship on the Company, but, as we held in Cummins v. Parker Seal Co., 516 F. 2d 544, 551(6th Cir. 1975), 'undue hardship is something greater than hardship,' and an employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.

In the instant case, the employer, Travelers Inns had accommodated the religious beliefs and practices of Genith Douglas for two and one-half years without incurring any problems or increased costs. Having induced her to work two consecutive Sundays in violation of her religious beliefs

based on the misrepresentation that the Company would never ask her to violate her beliefs again, the employer can hardly be said to have proved undue hardship when it had hired two new cooks before telling the employee Douglas that she would have to work every other Sunday. Having based its decision solely upon potential hardships that it perceived, the District Court and Fourth Circuit applied the wrong standard of proof for undue hardship.

This case is of the level of importance that it should be accepted for review by this Court for four primary reasons. First, eight years have passed since this Court's decision in Hardison, and that is sufficient time to have had the opportunity to observe the decisions of

the circuit courts in applying the de minimis test for undue hardship. Having had that historical experience, it is now time to reassess and refine the undue hardship test and to determine whether the burden of proof of the employer under Section 701(j) of Title VII requires proof of actual as opposed to hypothetical undue hardship. Second, the practical effect of the conflict between the Fourth Circuit and the other circuits which have addressed the question raised in this Petition is that every litigant involved in a religious discrimination case under Title VII must face the issue as to what standard of hardship will in fact satisfy the employer's burden of proof on undue hardship. If the actual undue hardship standard is the correct one, then employees in the Fourth Circuit have had and

will continue to have their rights under Section 701(j) rendered meaningless because of an erroneous evidentiary standard of potential hardship which every employer can articulate and meet. Third, the meaning of Footnote 15 in Hardison appears to run as a common thread throughout the circuit court decisions. Having been subject to numerous interpretations by the district and circuit courts, this issue should be clarified so that there is a common and definitive test that can be applied by all courts. Although this Court has accepted numerous cases for review addressing race, sex, and age discrimination since 1977, the whole area of religious discrimination in employment has had an eight year hiatus with no guidance,

assessment, or refinement from this Court with respect to Section 701(j). Fourth, since the Hardison decision, federal regulations have been adopted by the EEOC seeking to promulgate guidelines. See 29 C.F.R. §1605 et. seq. (1984). An open question is whether and to what extent the circuit courts must defer to these regulations. Under 29 C.F.R. § 1605.2(d), alternatives for accommodating religious practices include voluntary substitutes and swaps, flexible scheduling, lateral transfer and change of job assignments. Undue hardship is defined under Section 1605.2(e) in pertinent part as follows:

> However, the Commission will presume that the infrequent payment of premium

> wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost.

In the Genith Douglas case, these guidelines were violated and ignored. In fact, few if any circuit courts have relied upon these regulations, inspite of the fact that this Court has previously stated that EEOC regulations are entitled to deference by the federal courts. Hardison, Id. at 126, n. 11.

Finally, subsumed in the primary issue raised in this Petition is whether as part of the employer's burden of proving that it reasonably

accommodated the religious beliefs of the employee without undue hardship, Section 701 (j) of Title VII requires the employer to consult first with employees with no religious objections before forcing the employee with religious objections to work on his or her Sabbath in violation of said religious beliefs. This subsidiary issue is involved in every action where an employee's religious beliefs do not allow him to work on the Sabbath and the employer schedules that employee to work on that day. In the instant case, Genith Douglas was forced to continue working on Sundays in violation of her religious beliefs when there were other available employees with no religious objections who were available to work on Sunday

and were not consulted by Travelers Inns.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F. Supp. 1(D. Oregon, 1973), the Court held that the burden is on the employer to consult with and seek out the cooperation of ther employees in reasonably accommodating the individual employee's religious beliefs. Although, this is the only federal court which has specifically stated this duty, it would appear to go to the very heart of the actual undue hardship vis-a-vis potential undue hardship issue. That is whether an employer who fails to consult with other employees at all, as was the case in Douglas, can claim that it would have suffered undue hardship

by accommodating the employee's religious beliefs and practices.

For these reasons discussed herein, the primary issue presented in this Petition is of the significant level of importance that it should be accepted for review by this Court. The defendant's burden of proof in a discrimination case other than religion(i.e. race, sex, age, national origin) was clarified in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207(1981). It is now time for this Court to clarify and refine those issues left open in Hardison with respect to the employer's burden of proof under Section 701(j) of Title VII.

CONCLUSION

Based upon the above-mentioned reasons, petitioner, Genith A. Douglas, asks this Court to grant her Petition for Certiorari.

This 5th day of July, 1985.

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CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 5th day of July, 1985 mailed the required copies of the Petition for Certiorari to the Clerk's office of the Supreme Court of the United States for the purpose of filing on July 5, 1985, and have also mailed the required copies of the above-mentioned documents to all attorneys of record as follows:

Mr. Hamilton C. Horton, Jr.
HORTON, HENDRICK AND KUMMER
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IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WILKESBORO DIVISION

GENITH A. DOUGLAS, Plaintiff,	)	
vs.	)	NO. C-79-370-W
TRAVELERS INNS OF NORTH WILKESBORO, INC., d/b/a HOLIDAY INN OF WILKESBORO, Defendant.	)	

MEMORANDUM OPINION

GORDON, Senior District Judge

Introduction

Plaintiff, Genith A. Douglas, filed this action on May 5, 1979, contending that the defendant Travelers Inns of North Wilkesboro, Inc., d/b/a Holiday Inn of Wilkesboro (hereinafter Travelers Inns), discriminated against her in job

promotions because of her race, in alleged violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e, et. seq.) On May 5, 1980, the Court allowed the plaintiff's motion to amend her complaint in which she also contended that the defendant Travelers Inns discriminated against her by discharging her from her employment on the basis of religion, in further violation of Title VII of the Civil Rights Act of 1964, as amended. Plaintiff seeks compensatory and punitive damages.

The action was tried to the Court without a jury on both of the plaintiff's claims of discrimination, beginning on September 28 and 29, 1983, and concluding on November

22, 1983, with the introduction of the trial deposition of Ms. Hazel Miller and the presentation of oral arguments. Having fully considered the evidence presented at trial, arguments of counsel, trial briefs, stipulations and other matters of record, this Court must conclude that the plaintiff has failed to show illegal discrimination such as to entitle her to recover from the defendant. In support of this opinion, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff, Genith A. Douglas, is a black female citizen of the United States presently residing

in Orlando, Florida, and was employed by Travelers Inns of North Wilkesboro, Inc., from December 25, 1972, until May 28, 1975. During said employment period, Ms. Douglas worked as a cook in the hotel restaurant.

2. Defendant Travelers Inns of North Wilkesboro, Inc., does business as the Holiday Inn of Wilkesboro by operating a 100-room hotel and restaurant in Wilkesboro, North Carolina, and is an "employer" within the meaning of 42 U.S.C. Section 2000e(b), in that it is engaged in an industry affecting commerce and has employed fifteen or more employees during the relevant time periods.

3. Travelers Inns employes in-

dividuals in its restaurant operation to work as food preparers, bartenders, dishwashers, busmen, and waitress-servers. These various kitchen employees are managed by a kitchen or food supervisor.

4. All employment decisions at Travelers Inns during the relevant period were made ultimately by the respective Innkeepers in charge of the hotel: Mr. Vernon W. Lamoureaux, from the plaintiff's hiring until July 1974, and Mr. Jimmy Roger Kirkman, from July 1974 until the plaintiff's employment with Travelers Inns ended during May 1975.

5. Travelers Inns hired most of its work force through "walk in" applicants, personal references, and

from former employees or trainees within the Travelers Inns' hotel and restaurant system.

6. Travelers Inns did not adopt job grades or written job qualifications from 1972 to 1975.[1] Although written job guidelines were provided by the Holiday Inn hotel system, it was up to the Innkeeper of the hotel to designate job description and duties.

7. Genith A. Douglas, a black female, was hired on December 25, 1972, as a cook in the hotel restaurant at Travelers Inns although she applied for the position of "chamber maid."[2] At the time she was hired,

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[1]See Plaintiff's Exhibit Nos. 32 and 33.

[2]Defendant's Exhibit No. 1. See also Deposition of Ms. Genith A. Douglas, pp. 19-23.

Ms. Douglas had completed the tenth grade of high school, she had worked as a domestic housekeeper in private homes for about nine years, and afterwards, she had worked on occasion for about six years as a "caterer" at private parties in association with her aunt, a beautician in New York. She had no prior restaurant or professional catering experience or training. She indicated no need or desire to attain further food service training or education, and was not advised of kitchen management training programs available within the Travelers Inns' system. She testified at her deposition that she did not consider further training or education because "as far as I was concerned then,...

I knew all there was to know about it..."[3]

8. Prior to being hired at Travelers Inns, Ms. Douglas testified that she informed Innkeeper Vernon W. Lamoureaux that she held religious beliefs which precluded her from working on Sunday, which was the day of her religious observance. Ms. Douglas attended and was a member of the Missionary Baptist Church in Wilkesboro, North Carolina, at that time. Innkeeper Lamoureaux testified that he did not know whether Ms. Douglas had voiced any religious objections to working on Sunday, but the Court concludes that, based partly

[3]Deposition of Ms. Genith A. Douglas, p. 39.

on the testimony of the plaintiff and Ms. Hazel Miller,[4] Ms. Douglas did voice her objection to working on Sunday with the Travelers Inns' management.

9. Ms. Douglas served as a cook initially under the supervision of Ms. Hazel Miller, the kitchen supervisor at Travelers Inns. Ms. Miller had served as kitchen supervisor for approximately two years, had completed eleven years of education(the equivalent of a high school diploma), and her prior experience was as a cook at a small sandwich shop and at her home. As a cook, Ms. Douglas was trained and had the responsibility for assisting Ms. Miller in making daily menus with prices, ordering food twice a month,

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[4]Trial Deposition of Ms. Hazel Miller, p. 10.

and preparing the buffet lines. At this time, Ms. Miller did not use the standard Holiday Inn requisition forms for ordering meats and vegetables.[5] Innkeeper Lamoureaux testified that he and Ms. Miller jointly prepared the menu with prices and the "buffet memory chart " and that he never performed these tasks with Ms. Douglas. Ms. Douglas testified that Ms. Miller would orally inform her two to three times a month that she was doing an "excellent job."

10. Ms. Douglas alleged that Travelers Inns discriminated against her by failing to promote her to the position of kitchen supervisor when it

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[5]Trial Deposition of Ms. Hazel Miller, p. 29.

became available on several occasions. Ms. Douglas contends that when the kitchen supervisor position was vacant on these occasions, she performed the duties and responsibilities of the kitchen supervisor despite receiving wages as a cook. Ms. Douglas further maintains that she was qualified for this position, but was not considered because of her race, and, consequently, other white individuals were hired with Little or no experience and she was required to train them.

11. Ms. Douglas did not name the white employees she considered to have been treated better than she in promotions; but, at trial, the employment history of the kitchen supervisor position was revealed during the period from 1972 to 1975. Ms. Douglas

was not personally aware of the other employees' qualifications, nor did she satsifactorily dispute Travelers Inns' enumeration of those qualifications. In order of hiring, the various white employees who assumed some or all of the duties of the kitchen supervisor position included: Mr. Al Durange, Ms. Suanne Wilson, Mr. Henry Hager and Mr. Robert Grady.

12. About one year after Ms. Douglas became employed by Travelers Inns as a cook, Ms. Hazel Miller, a white female, resigned from her kitchen supervisor position due to health reasons in the Fall of 1973, creating a vacancy in that position. After approximately one to two weeks

had elapsed, Innkeeper Lamoureaux hired Mr. Al Durange, a white male, as Assistant Manager of the hotel, also known as the Food and Beverage Director. Ms. Douglas never applied for the position of kitchen supervisor, and Innkeeper Lamoureaux testified that she was not considered because, in his opinion, she was "not qualified" for the job.

13. Mr. Durange was hired as Food and Beverage Director at Travelers Inns because of his prior work experience as a cook and supervisor in charge of budgeting, quality control, selection of foods, and hiring and firing of kitchen personnel in another Holiday Inn hotel; and, on the professional training he had received as a management trainee in

Food and Beverage School in Memphis, Tennessee. While serving as the Food and Beverage Director for Travelers Inns, he also assumed the duties of Kitchen supervisor. Innkeeper Lamoureaux testified that, during this period, he and Mr. Durange assumed the duties and responsibilities of requisitioning of food and supplies, preparing menus with prices, taking inventory, and supervising banquets and Sunday buffets (the largest meal of the week[6]), and that Ms. Douglas did not assist in any of those tasks. Ms. Douglas testified that she felt qualified to be the kitchen supervisor, but that she only assisted Mr. Durange in his daily duties of preparing food

[6] See, i.e., Trial Deposition of Ms. Hazel Miller, pp. 21-22.

and the menus.

14. Mr. Durange left Travelers Inns in the Spring of 1974, and Innkeeper Lamoureaux testified that he assumed the duties of Mr. Durange, such as menu planning, requisitioning food and general food supervision, until his resignation and departure in July 1974.

15. In July 1974, Mr. Jimmy Roger Kirkman, a white male, was hired as the Innkeeper at Travelers Inns, and he added the duties of kitchen supervisor to his own duties as Innkeeper. Mr. Kirkman had previsouly worked in all phases of hotel and motel operations, including restaurant and banquets, at eight different hotels, had attended

Holiday Inn University and the Food and Beverage Innkeepers School, and was, at the time, President of the Charlotte, North Carolina, Innkeepers Association.

16. Innkeeper Kirkman promoted Ms. Suanne Wilson, a white female employee of Travelers Inns since March 1974, to the duties of the kitchen supervisor position in August 1974. Prior to this promotion, Ms. Wilson had worked in food preparation and had been trained in part about the Travelers Inns' restaurant operation by Ms. Douglas. Ms. Douglas testified that, in training and observing Ms. Wilson she considered Ms. Wilson a "sloppy and poor cook," and she observed no cooking abilities indicating prior experience. Ms. Stella price, a dishwasher at the

time, testified that Ms. Wilson would "put potatoes all over the floor when she whipped them," and that she kept the kitchen "nasty." However, Ms. Price had no personal knowledge about the prior experience or education of any of the kitchen supervisors hired at Travelers Inns.

17. Innkeeper Kirkman testified that he promoted Ms. Wilson based partly on her prior work experience and education, which included two and one-half years of college with a concentration in dietetics, approximately four years of employment as a waitress, part-time cook and dietician's aide in four businesses, and some limited experience in supervision of other employees and baking;

and partly on the recommendation of the Director of the Wilkes County Community College, where Ms. Wilson was then enrolled in the Food and Beverage School. Mr. Kirkman also testified that Ms. Wilson never fully assumed the duties of kitchen supervisor in that he personally prepared the menus and ordered the food for her. Innkeeper Kirkman further testified that Ms. Douglas was never interviewed for the job, that he never considered her for the kitchen supervisor position, and that she was "not qualified" for the job. Further, if Ms. Douglas had ever asked him to be promoted, Innkeeper Kirman stated that he would have then advised the Travelers

Management Corporation(TRAVCO) in Winston-Salem, North Carolina, of the request, and would have had her placed in management training school.

18. On January 9, 1975, Ms. Suanne Wilson resigned as kitchen supervisor in order to pursue studies at the University of North Carolina at Greensboro. Ms. Wilson was rehired as a cook on January 23, 1975. Innkeeper Kirkman testified that he assumed the duties of kitchen supervisor for about one month.

19. In February 1975, Innkeeper Kirkman hired Mr. Henry Hager, a white male known as "Sarge Hager," for the kitchen

supervisor position. Mr. Hager had attended bakers, cooks, meat cutters and restaurant management schools in the United States Army, and had twenty-fours years experience in the foods service and preparation business in various hotels, including Holiday Inns in Statesville and Sanford, North Carolina. Innkeeper Kirkman testified that he never considered Ms. Douglas for the position because of her lack of experience in food requisitioning and setting up menus, and her limited education.

20. Mr. Hager resigned as kitchen supervisor on June 20, 1975, was rehired on July 3, 1975, resigned again on July 17, 1975, was rehired on July 24, 1975, and ultimately retired on July 31, 1975, because

of his age. During this time, Innkeeper Kirkman testified that he assumed the duties of kitchen supervisor during Mr. Hager's absences, and that Ms. Douglas' duties were limited to the actual preparation of food.

21. In May 1975, Travelers Inns hired Mr. Robert Grady, a white male, as Food and Beverage Director, which included the duties of kitchen supervisor during and after Mr. Hager's term of employment with Travelers Inns. Mr. Grady had completed one hundred and twelve hours of course credit at the University of North Carolina at Chapel Hill, had cooking, butchering, purchasing and managering

experience from three private restaurants, and had operated his own wholesale seafood distributing company. Innkeeper Kirkman testified that Mr. Grady was responsible for numerous duties which Ms. Douglas did not perform, including menu planning, meat selection, food requisitions, and banquet garnishment.

22. During the course of Ms. Douglas' employment, Innkeeper Lamoureaux testified that Travelers Inns had hired two black individuals in management positions: Ms. Juanita Graham, as housekeeper supervisor, and a female individual named Martha, as head hostess for the morning shift.

23. Ms. Douglas also claims

that she was terminated from her position as cook because she was required to work on alternating Sundays, which was against her religious beliefs because Sunday was the day of her religious observance. Ms. Douglas further contends that Travelers Inns did not attempt to accommodate her religious observances, and that she was discriminated against on the basis of her religion. Travelers Inns countered that Ms. Douglas did, in fact, agree to work at least two Sundays, and that upon learning of Ms. Douglas' religious beliefs, Travelers Inns hired an additional cook to work alternate Sundays, and they made reasonable accommodations for such religious

beliefs by attempting to find another cook so that Ms. Douglas could be excused from any Sunday labor. The events relative to this claim follow.

24. During the Spring of 1975, Innkeeper Kirkman was having problems structuring the work schedule of his staff in that he had recently lost a cook and a front desk employee, and the recently enacted Wage and Hour laws had limited his current staff to forty-four hours per week instead of the usual forty-eight hours per week. In an effort to keep a full staff working during the seven days a week operation of the restaurant, Mr. Kirkman approached Ms. Douglas about preparing the noon buffet at the Travelers Inns on two consecutive

Sundays until he could hire other cooks. Travelers Inns had not asked Ms. Douglas to work on Sundays for the past two and one-half years that she was employed at Travelers Inns. Ms. Douglas voiced her religious objection to working on Sunday to Mr. Kirkman, but nevertheless, she agreed to work on the two Sundays in order to get Mr. Kirkman "out of a bind."

25. In addition to Ms. Douglas, Travelers Inns also employed three other cooks at that time: Mr. Donald Champion, a part-time trainee, Ms. Blanche Soots, a second cook, and Mr. Dewey Blevins, a part-time trainee.

26. Innkeeper Kirkman did, in fact hire one other cook, Ms. Louise

Carson, to work on Sundays, but the shortage of first cooks made it necessary for Mr. Kirkman to ask Ms. Douglas to work every other Sunday until another cook could be hired. When advised of this temporary arrangement, Ms. Douglas stated that she could not work on any more Sundays because of her religious beliefs. Mr. Kirkman responded that he had to have someone he could rely on because he was "in a bind," and that if she could bear with him one more week or so, he would hire another cook to work on Sundays. Ms. Douglas replied that she thought he had promised her that she would not have to work on weekends anymore because of the long hours

she had been putting in. Mr. Kirkman then stated that working on alternate Sundays was the best that he could do at that time, and he told her she could either work on alternate Sundays, or "that's it." Ms. Douglas interpreted this conversation to mean that she was fired, and she left her job that same day on May 28, 1975. However, Ms. Douglas further testified by deposition that working on Sundays was only "part of it," and that she left partly because she was not made kitchen supervisor.[7]

27. After Ms. Douglas left her position as cook, Innkeeper Kirkman and Food and Beverage Director Robert Grady shared the duties as cook until

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[7] Deposition of Ms. Genith A. Douglas, p. 64.

another cook was hired the following week. Ms. Douglas did not re-apply for a cook position at Travelers Inns. Mr. Kirkman was thereafter informed that he was "no longer needed" as Innkeeper at Travelers Inns due to the sporadic business of the hotel during the oil shortage, and he left Travelers Inns in July 1975.

28. Ms. Douglas was later employed as a cook at Vespers and the Carolina Nursing Home, nursing homes for the elderly, in Wilkesboro, North Carolina, for about three months and eight months respectively. She did not attain the position of kitchen supervisor at these businesses.

29. Ms. Douglas then moved to Orlando, Florida, in 1978, where she

thereafter joined the Tangelo Baptist Church. She was eventually hired as a cook in the Holiday Inn at Orlando, the largest Holiday Inn in the United States. Her duties included the supervision of two cooks and a salad girl, food preparation and general clean-up. Ms. Douglas contends that she was promoted to the position of "kitchen supervisor" over the night shift in about a year and one-half time with the hotel. There is conflicting testimony on this point. Ms. Douglas initially testified that she performed the duties of and continued to hold the position of "kitchen supervisor," but later testified that she had complained

to the Director of Personnel at the Orlando Holiday Inn, Ms. Ginny Merchang, about being demoted from her position of "shift line supervisor" to "shift leader" in August 1982,[8] and that she was in actuality on a six-month leave of absence from her position at the Orlando Holiday Inn due to health reasons. The Court concludes that Ms. Douglas probably holds a position somewhat similar to that of a "kitchen supervisor" at the Orlando Holiday Inn, but does not find such fact to be persuasive on the outcome of any determinative issues in this action.

30. Mr. Billy Barnes, Director of Financial Services for the

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[8]Cf. Plaintiff's Exhibit No. 34.

Traveler's Management Corporation (TRAVCO) of Winston-Salem, North Carolina, also testified and presented documentary evidence, pursuant to a subpoena duces tecum,[9] which the Court assumes is intended to establish the kitchen supervisor

[9] The Court feels compelled to note that the plaintiff counsels' issuance of a subpoena duces tecum on this witness the weekend before the trial, especially when the final pre-trial conference of this matter was conducted on May 26, 1981, left something to be desired in terms of timeliness and fairness. Because of this late issuance, plaintiff's presentation of evidence was not well served by such haphazard attempts to find facts from material which should have been discovered much earlier. The Court will not entertain evidence in this fashion in the future, and counsel is cautioned to use such discovery devices with wiser discretion.

pay scale at Travelers Inns during the periods from 1973 to 1983. This evidence consists of the pay records of Ms. Genith A. Douglas, Ms. Suanne Wilson, Mr. Henry Hager, and Mr. Robert Grady,[10] although the pay records of Ms. Hazel Miller and Mr. Al Durange were not available on such short notice. There was no attempt to clarify these records or to link them adequately to any other testimony or exhibits.

31. Ms. Douglas filed a charge with the Equal Employment Opportunity Commission (EEOC) on June 23, 1975. She received a right to sue letter on or about February 17, 1979. This action was filed on May 15, 1979,

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[10] Plaintiff's Exhibits Nos. 1-17 and 11-27. See also Defendant's Exhibits Nos. 1-4.

and an amendment to the complaint was filed on May 6, 1980.

Discussion

I. Racial Discrimination Claim

Plaintiff first contends that the failure of the defendant Travelers Inns to promote her to the position of kitchen supervisor was motivated by racial discrimination, thereby asserting an action under Title VII of the Civil Rights Act of 1964, as amended. In the context of the plaintiff's Title VII race discrimination claim, this is a "disparate treatment" case. See Wright v. National Archives and Records Service, 609 F. 2d 702, 713 (4th Cir. 1979). Thus, the resolution of a disparate treatment case depends on the succesive disposition of three

issues, in which the evidentiary burden shifts from party to party in the controversy. See Ambush v. Montgomery County Government Department of Finance Division of Revenue, 620 F. 2d 1048, 1052(4th Cir. 1980).

Initially, the plaintiff must prove that the defendant acted with unlawfully discriminatory purpose in failing to promote her. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 5(1978). Plaintiff has the initial burden, therefore of demonstrating a prima facie case of racial discrimination. If a prima facie case of discrimination is established, the burden of production shifts to the defendant to dispel any adverse inference by articulating legitimate,

nondiscriminatory reasons for its actions. Assuming the defendant has made such a showing, the burden then shifts to the plaintiff to prove by a preponderance of the evidence that the defendant's articulated reasons were a pretext for discrimination, and that the defendant acted with the requisite unlawful discriminatory purpose. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24(1978); Furnco Construction Corp. v. Waters, 438 U.S. 567(1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973); Smith v. Flax, 618 F. 2d 1062(4th Cir. 1980).

In McDonnell Douglas, the Supreme Court held that a Title VII complainant

may establish a prima facie case of racial discrimination by showing (i) that she belongs to a racial minority, (ii) that she applied and was qualified for a job which her employer was seeking applicants, (iii) that despite her qualifications, she was rejected, and (iv) after her rejection, the position remained open, and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. Factual settings necessarily vary in Title VII cases, and the prima facie standard set forth in McDonnell Douglas is not necessarily applicable in every respect to differing factual situations. Id. at 802 n. 13. Nevertheless,

McDonnell Douglas does make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remained unexplained, that it was more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." Furnco Construction Corp. v. Waters, 438 U.S. at 576. In this action, however, the McDonnell Douglas formula is an appropriate framework in which to analyze plaintiff's employment discrimination claim. Id. at 575-77; see also, United States Postal Service v. Aikens, 51 U.S. L.W. 4354, _____ U.S. _____ (April 4, 1983).

The Court concludes after a review

of the evidence in this case that Ms. Douglas, a black female, has failed to show that she has met the pre-requisites necessary in order to make out a prima facie case of racial discrimination in promotions. On the contrary, the plaintiff has failed to sufficiently show that she even applied for or was interested in any vacancies in the kitchen supervisor position for which she could have been considered. Cf. Weidman v. Western Electric Co., Inc., 527 F. Supp. 263(M.D. N.C. 1981). Furthermore, she has not shown that she possessed the qualifications for the kitchen supervisor position to which she aspired, especially those in management with the Travelers Inns' restaurant was essentially limited to

cooking and the actual preparation of food. An employer does not violate Title VII in seeking to fill its management positions with the most qualified and experienced people.

> When.... the pool from which supervisors are to be selected is the hourly paid work force, one naturally and inevitably looks to those who have acquired experience and demonstrated skills. The greater the experience and the greater the number of demonstrated skills, the more appropriate it is for consideration to focus upon a particular individual. One does not look for supervisors at the bottom rung of the ladder; it is at the top where any search may be expected to produce fruitful results.

Hill v. Western Electric Co., Inc., 596 F. 2d 99, 105(4th Cir. 1979); cert. denied, 51 U.S. L.W. 3340, _____U.S. _____(November 2, 1982); see also, Jones v. First Federal Savings and Loan Assocation, 564 F. Supp 762, 771-72(M.D. N.C. 1982).

Ms. Douglas listed several white individuals whom she thought had received better treatment in promotions than she. In each case, the individual mentioned, either because of education, experience, or both, possessed qualifications justifying the indicated hiring, promotion or transfer. They each had qualifications superior to those of Ms. Douglas, with years of experience and education which Ms. Douglas simply had not attained. Even if the Court were to accord full credit to Ms. Douglas' testimony, she was, at best, only arguably equally as qualified as the individuals mentioned by her. These individuals were certainly not less qualified than the plaintiff in any

respect. In Burdine, the Supreme Court elaborated upon the principles of McDonnell Douglas, and emphasized that in a promotion case, a claimant must show not only that someone else was hired for an opening in a position, but also that the qualifications of the person hired were less than, not equal to, those of the claimant:

> The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. McDonnell Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U.S. at 804...
>
> The Court's procedural rule harbors a substantive error.

Title VII prohibits all discrimination in employment based upon race, sex and national origin. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions. McDonnell Douglas, supra., at 801. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. Section 2000e-2(i). See, Steelworkers v. Weber, 443 U.S. 193, 205-06(1979). The statute was not intended to 'diminish traditional management prerogatives.' Id., at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. Furnco Construction Co. v. Waters, 438 U.S. 567, 577-78.

The views of the Court of Appeals can be read, we think, as requiring the employer to hire, the minority or female applicant whenever that person's

> objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. Loeb v. Textron, Inc., supra., 600 F. 2d 1003, 1012 n 6; see Lieberman v. Gant, 630 F. 2d 60, 63(2d Cir. 1980).

Id. at 258-59. Thus, the testimony and evidence of Ms. Douglas in this regard falls far short of any showing of discriminatory treatment in promotions.

Even if the plaintiff had established a prima facie case, the defendant has rebutted any "presumption of discrimination by producing evidence that the plaintiff was (not promoted)... for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. See also Board of Trustees v. Sweeney, 439 U.S. at 25 n.2; Furnco Construction Co. v. Waters, 438 U.S. at 578; Smith v. University of North Carolina, 632 F. 2d 316, 332-33(4th Cir. 1980). It is well recognized that denial of a promotion due to the fact that the employee is not qualified for the job is a legitimate and nondiscriminatory reason. Griggs v.

Duke Power Co., 401 U.S. 424(1971); Young v. Edgecomb Steel Co., 499 F. 2d 97, 98(4th Cir. 1974); Hairston v. McLean Trucking Co., 520 F. 2d 226, 232(4th Cir. 1975). As stated in the Young case, "Title VII of the Civil Rights Act of 1954 unequivocable condemns the denial of a promotion because of race, but it does not demand that an employee be placed in a position for which (she) is not qualified." 499 F. 2d at 98. Furthermore, the plaintiff has not produced any "competent evidence to show that the company's reason (for her non-promotion) was merely a pretext." Wade v. New York Telephone Co.,

500 F. Supp. 1170, 1178(S.D.N.Y. 1980). See also Texas Department of Community Affairs v. Burdine, supra; McDonnell Douglas v. Green, 411 U.S. at 804; Smith v. University of North Carolina, 632 F. 2d at 332-22; and, Wright v. National Archives and Records Service, 609 F. 2d at 716. Thus, the testimony and evidence of Ms. Douglas as to this claim falls short of a showing of discrimination.

II. Religious Discrimination Claim

The religious discrimination claim of Ms. Douglas is also unsupported by the evidence. As

enumerated under Section 703(a)(1) of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000e-2(2)(a)(1), the employer has the statutory duty to make reasonable accomodations for the religious observance of its employee, so as not to discriminate against such employee, short of incurring an undue hardship. The 1972 amendments to Title VII adds Section 701(j), which states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Ninth Circuit has succinctly stated the elements of a prima facie case under Title VII:

> To establish a prima facie case of discrimination under Sections 2000e-2(a)(1) & (j), Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and the payment of union dues are contrary to his religious faith; (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay Union dues.

Anderson v. General Dynamics Convair Aerospace Div., 589 F. 2d 397, 401 (9th Cir. 1978), cert. denied 442 U.S. 921(1979). See also Brown v. General Motors Corp., 601 F. 2d 956 (8th Cir. 1979); Redmond v. GAF Corp., 574 F. 2d 897(7th Cir. 1978).

The burden then shifts to the employer to prove that they made good faith efforts to accommodate the employee's religious beliefs and, if such efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate the beliefs "without undue hardship." Anderson v. General Dynamics Convair Aerospace Div., 589 F. 2d at 401, Redmond v. GAF Corp., supra.

Ms. Douglas contends that she was "constructively discharged" from her employment because she was required to work on alternating Sundays, which was against her

religious beliefs as Sunday was the day of her religious observance. Although the Court is not totally persuaded by the "sincerity" of her religious belief, especially in light of the fact that she held a job which required Sunday work and she had worked on two consecutive Sundays prior to her alleged discharge, the Court nevertheless concludes that the plaintiff has demonstrated the requisite sincerity of religious convictions, of which she so informed her employer, and thus has established a prima facie case of discrimination for being

"discharged" because of such religious belief. Cf. Hansard v. Johns-Mansville Products Corp., 5 FEP 707(E.D. Tex. 1973) with Kettle v. Johnson & Johnson, 337 F. Supp. 892(E.D. Ark. 1972). See also, McGinnis v. U.S. Postal Service, 512 F. Supp. 517, 520 (N.D. Cal. 1980); Edwards v. School Board of the City of Norton, Va., 483 F. Supp. 620(W.D. Va. 1980), vacated on other grounds, 658 F. 2d 951(4th Cir. 1981).

However, despite such a prima facie showing of discrimination under Section 2000e-(j), the Court concludes that the defendant has

met its burden of proving, first, that they made good faith efforts to accommodate Ms. Douglas' religious beliefs, and, second, that they were unable reasonably to accommodate her beliefs without undue hardship. In the leading case of TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63(1977), the Supreme Court addressed the reasonable accommodation issue and noted that it is "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." Id. at 75. In

regards to the employer's obligation, however, a finding of more than a de mininimus cost will constitute an undue hardship. Id. at 84.

A review of the evidence presented at trial shows that Travelers Inns did, in fact, make good faith efforts to reasonably accommodate Ms. Douglas' religious beliefs. Due to the recent loss and shortage of employees at Travelers Inns, the seven-days-a-week operation of the hotel and restaurant and the necessary compliance with the recently-enacted wage and hour laws, Travelers Inns had to make

accommodations with the available qualified personnel in order to make the shifts equal for all employees. As the only first cook available, Ms. Douglas initially agreed to this arrangement, and she voluntarily worked on two Sundays. In a further effort to accommodate Ms. Douglas, Travelers Inns hired another cook, Ms. Louise Carson, to work on alternate Sundays with Ms. Douglas until another cook could be hired to replace her. Despite this temporary restructuring of the work schedule, Ms. Douglas interpreted such arrangements to mean that she was discharged. In actuality, however, Travelers Inns was making a good faith effort to

accommodate Ms. Douglas' religious beliefs, and her unreasonable interpretation of the accommodation process to mean that she was forced to resign finds no basis or support from the evidence. See Jordan v. North Carolina National Bank, 565 F. 2d 72(4th Cir. 1977). See also Chrysler Corp. v. Mann, 561 F. 2d 1282(8th Cir. 1977), cert. denied, 434 U.S. 1029(1978).

Moreover, to require further accommodation action on the part of Travelers Inns would constitute an undue hardship on its business. Travelers Inns has satisfactorily shown that it attempted in good

faith to make reasonable accommodations for Ms. Douglas' religious beliefs, even to the extent of hiring one and seeking another additional replacement cook, and further accommodation would create an undue hardship where limited numbers of employees at the plaintiff's position were available. See Johnson v. U.S. Postal Service, 497 F. 2d 128(5th Cir. 1974);Olds v. Tennessee Paper Mills, Inc.,11 FEP 350, 352(E.D. Tenn., 1974), aff'd mem., 524 F. 2d 1405(6th Cir. 1975); Dixon v. Omaha Public Power District, 385 F. Supp. 1382 (D. Neb. 1974). If Travelers Inns were required to strictly

abide by the plaintiff's demands, it would create extra expense to accommodate not only Ms. Douglas, but any other employee who might be affected by such a concession. And, where an accommodation would impose more than a de minimus cost in lost efficiency, or which would be an imposition on co-workers tantamount to reverse discrimination against them, an undue hardship would lie. Hardison, 432 U.S. at 78-85. Lastly, Travelers Inns' past practice of accommodating Ms. Douglas' religious beliefs for over two and one-half years further supports a finding of undue hardship where the evidence revealed

that Ms. Douglas left her employment despite Travelers Inns' earnest efforts to locate another employee to excuse her from further Sunday labor. Id. at 68. See also Huston v. United Auto Workers, Local 93, 559 F. 2d 477(8th Cir. 1977); Ferguson v, Kroger Co., 16 FEP 733(S.E. Ohio 1978). It follows, therefore, that Ms. Douglas was not wrongfully discharged from her employment as stated in 42 U.S.C. Section 2000e-2(a)(1). Based on the foregoing findings of fact and discussion, the Court hereby makes the following conclusions of law.

Conclusions of Law

1. The Court has jurisdiction of this action pursuant to 42 U.S.C. Section 2000e, et. seq.

2. Travelers Inns of North Wilkesboro, Inc., d/b/a Holiday Inn of Wilkesboro, North Carolina, is an employer as that term is defined by Title VII of the Civil Rights Act of 1964, as amended.

3. Travelers Inns did not violate Title VII of the Civil Rights Act of 1964, as amended, by failing to promote Ms. Genith A. Douglas from the position of cook to kitchen supervisor.

4. Travelers Inns did not

violate Title VII of the Civil Rights Act of 1964, as amended, by attempting in good faith to reasonably accommodate Ms. Genith A. Douglas' religious beliefs without causing undue hardship on its business.

5. The evidence in this case clearly shows that Ms. Genith A. Douglas is not entitled to compensatory or punitive damages.

6. The evidence in this case does not call for any injunctive relief.

7. Neither party is entitled to an award of attorney's fees, costs or disbursements.

8. Having considered all the evidence presented and for the reasons stated above, the Court, reserving its right to make supplemental findings and conclusions should this action become the subject of an appeal, will enter a separate order dismissing this action with prejudice.

s/Eugene A. Gordon
United States District Judge

December 13, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WILKESBORO DIVISION

GENITH A. DOUGLAS, Plaintiff,	)	
v.	)	NO. C-79-370-W
TRAVELERS INNS OF NORTH WILKESBORO, INC., d/b/a HOLIDAY INN OF WILKESBORO, Defendant.	)	JUDGMENT

For the reasons set out in a Memorandum Opinion entered contemporaneously herewith, the Court made Findings of Fact and Conclusions of Law and concluded that judgment on all claims should be rendered for the defendant.

Now, therefore, pursuant to the Findings of Fact and Conclusions of Law filed herein, IT IS ORDERED that plaintiff have and recover nothing

from the defendant and that her claims in this action be, and the same hereby are, dismissed with prejudice.

s/Eugene A. Gordon
United States District Judge

December 13, 1983

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1071

Genith A. Douglas,
Appellant,

-versus-

Travelers Inns of North Wilkesboro, Inc. d/b/a Holiday Inn of Wilkesboro,
Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro. Eugene A. Gordon, District Judge.(C/A 79-370)

Argued: Ocotober 4, 1984. Decided: April 5, 1985

Before RUSSELL and SPROUSE, Circuit Judges, and HARGROVE, United States

District Judge for the District of Maryland, sitting by designation.

Harvey L. Kennedy (Kennedy, Kennedy, Kennedy and Kennedy on brief) for Appellant; Hamilton C. Horton, Jr. (Horton, Hendrick & Kummer on brief) for Appellee.

PER CURIAM:

This is an appeal in an action brought pursuant to Title VII, Civil Rights Act of 1964, as amended 42 U.S.C. Section 2000e, et. seq. (1983), by the plaintiff/appellant Genith A. Douglas against her employer defendant/appellee Travelers Inns of North Wilkesboro, Inc., d/b/a Holiday Inn of Wilkesboro, alleging discrimination in job promotions because of her race and also on the basis of her religion. The district court entered judgment for the defendant. We affirm.

The district court made full and detailed findings of fact, supported by substantial evidence in the record. We cannot, therefore, say that the findings are clearly erroneous.

On the basis of the findings of fact and conclusion of law of the district court, the judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85 - 145

****

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

GENITH A. DOUGLAS,

Petitioner,

vs.

TRAVELERS INNS OF NORTH WILKESBORO, INC. d/b/a HOLIDAY INN OF WILKESBORO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. Paul Hendrick
Hamilton C. Horton, Jr.
Gray Robinson
HORTON HENDRICK & KUMMER
450 NBNC Plaza
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STATEMENT OF THE CASE

Respondent hereby incorporates by reference the entire Memorandum Opinion rendered by the District Court below as its statement of the case. The Memorandum Opinion is set forth at page 1a of Petition. Petitioner's statement of the facts and her discussion of the evidence is argumentative and completely ignores the findings of fact set forth by the District Court.

DISCUSSION

NO CONFLICT EXISTS BETWEEN THE CIRCUIT COURTS AS TO THE EMPLOYER'S BURDEN OF PROOF WITH RESPECT TO "UNDUE HARDSHIP" UNDER SECTION 701(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. Section 2000e-2(j)

This petition arises under Section 701(j) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(j) (Section 701(j)), which states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business. (emphasis added)

The sole issue raised by the Pet-

itioner is the proper interpretation of what is an "undue hardship on the conduct of the employer's business" as is set forth in Section 701(j). Petitioner suggests a great rift between the Fourth Circuit and other circuits, arguing that the Fourth Circuit has contravened the obvious intent of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977) and that therefore, a Writ of Certiorari should be granted herein. (Petition pp 12, 16-41).

Respondent, after a careful review of the cases cited by Petitioner and later cases decided in the Circuit

Courts strongly contends that no such conflict exists and there are no grounds sufficient to warrant a Writ of Certiorari in this case.

In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977) this Court for the first time definitively interpreted the employer's responsibility to accommodate employees' religious beliefs under Section 701(j). This court indicated that, at that time, neither Congress nor the Equal Employment Opportunity Commission had defined "reasonable accommodation". Furthermore, this Court noted that two

Circuit courts, i.e., the Fifth and Sixth, had reached different results under similar circumstances. Hardison, 432 U.S. at 75, n. 10.

In order to set guidelines for future decisions this Court held that an employer need not (1) breach a collective bargaining agreement if no other accommodations were available nor (2) incur more than a de minimis cost in order to "reasonably accommodate" an employee. This Court stated:

> "To require [an Employer] to bear more than a de minimis cost in order to give Hardison Saturday off is an undue hardship"

432 U.S. at 84.

Petitioner proposes that a new standard must be set as to what is "de minimis cost". She has asserted that several circuits, i.e. Third, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits require evidence of actual, incurred, quantifiable costs in order to achieve the de minimis standard; whereas, the Fourth Circuit, according to Petitioner's forshortened version of the evidence in the instant case, only requires evidence of preceived or theoretical costs to establish undue hardship.

The uniform principle recognized

by Hardison and all Circuit Courts is that "reasonable accommodation" is a factual issue to be determined on a case by case basis and dependent on the unique circumstances of the individual employer - employee relationship. Hardison, 432 at 75, n. 10; Yott vs. North American Rockwell Corp., 602 F. 2d 904 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980); Nottelson vs. Smith Steelworkers, 643 F. 2d 445 (7th Cir. 1981); Redmond vs. GAF Corp., 574 F. 2d 897 (7th Cir. 1978). As we shall see from a review of the cases cited by Petitioner, and later cases found by Respondent, no actual conflict exists in the Circuit

Courts, but rather, these cases merely turn on their own particular facts.

(a) Fourth Circuit:

The Petitioner singles out the Fourth Circuit as the only Circuit which does not correctly interpret the Hardison opinion (Petition, pp. 12, 16-41). It cites two decision for this proposition, Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir 1977); and the opinions below. However, reference to the Jordan decision and the Memorandum Opinion rendered below illustrates the Fourth Circuit's careful

and reasoned adherence to the guidelines in Hardison.

(1) Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977). This case involved a unique factual situation in that plaintiff refused to allow the employer any chance to accommodate her religious beliefs. Jordan demanded an absolute guarantee from the defendant Bank that she would not work on her Sabbath, (from sundown Friday to sundown Saturday), before she would go to work for the defendant Bank. The defendant Bank was willing to accommodate and work with the defendant regarding her

beliefs but due to potential liability could not offer a naked guarantee. Jordan then sued for violation of her religious rights under 42 U.S.C. Section 2000e-2(a) and (j). The Court held that the defendant Bank was faced with an impossible and unreasonable condition which it could not accommodate even if it wanted to, and therefore no violation of Section 701(j) occurred. The court reasoned that Hardison did not stand for the proposition that an employer would have to make such a guarantee. See, Bhatia v. Chevron, USA, Inc. 734 F. 2d 1382 (9th Cir. 1984) (discussed below) for a similar result.

(2) Douglas v. Travelers Inns of North Wilkesboro, Inc., No. C-79-370-W (W.D.N.C. 1983), aff'd per curiam, No. 84-1071 (4th Cir. 1985) (attached as Appendix to Petition). As will be further discussed below, the Petitioner places the greatest emphasis in her argument of inter-circuit conflict upon the Memorandum Opinion rendered by the trial court below and affirmed by the Fourth Circuit. (Petition, pp. 5-9, 16-22, 28, 33-34, 38-40). This position is easily countered by reference to the findings of fact as discerned in the Memorandum Opinion.

While it should be noted in

passing that Petitioner's arguments would be better placed in her Brief on the Merits pursuant to Rule 34 of the Rules of this Court we must also note that the Petitioner completely ignores the findings of fact rendered by the trial court below and relies only on evidence which she feels is relevant to her case. In an effort to clarify the basis for the Fourth Circuit's opinion. Therefore, Respondent feels it must set out the actual findings of the trial court on this issue:

> "23. Ms. Douglas also claims that she was terminated from her position as cook because she was required to work on alternating Sundays, which was against her religious beliefs

because Sunday was the day of her religious observance. Ms. Douglas further contends that Travelers Inns did not attempt to accommodate her religious observances, and that she was discriminated against on the basis of her religion. Travelers Inns countered that Ms. Douglas did, in fact, agree to work at least two Sundays, and that upon learning of Ms. Douglas religious beliefs, Travelers Inns hired an additional cook to work alternate Sundays, and they made reasonable accommodations for such religious beliefs by attempting to find another cook so that Ms. Douglas could be excused from any Sunday labor. The events relative to this claim follow.

24. During the Spring of 1975, Innkeeper Kirkman was having problems structuring the work schedule of his staff in that he had recently lost a cook and a front desk employee, and the recently enacted Wage and Hour laws had limited his current staff to forty-four hours per week instead of the usual forty-eight hours per week. In an

effort to keep a full staff working during the seven days a week operation of the restaurant, Mr. Kirkman approached Ms. Douglas about preparing the noon buffet at the Travelers Inns on two consecutive Sundays until he could hire other cooks. Travelers Inns had not asked Ms. Douglas to work on Sundays for the past two and one-half years that she was employed at Travelers Inns. Ms. Douglas voiced her religious objection to working on Sunday to Mr. Kirkman, but nevertheless, she agreed to work on the two Sundays in order to get Mr. Kirkman "out of a bind."

25. In addition to Ms. Douglas, Travelers Inns also employed three other cooks at that time: Mr. Donald Champion, a part-time trainee, Ms. Blanche Soots, a second cook, and Mr. Dewey Blevins, a parttime trainee.

26. Innkeeper Kirkman did, in fact, hire one other cook, Ms. Louise Carson, to work on Sundays, but the shortage of first cooks made it necessary for Mr. Kirkman to ask Ms.

Douglas to work every other Sunday until another cook could be hired. When advised of this temporary arrangement, Ms. Douglas stated that she could not work on any more Sundays because of her religious beliefs. Mr. Kirkman responded that he had to have someone he could rely on because he was "in a bind," and that if she could bear with him one more week or so, he would hire another cook to work on Sundays. Ms. Douglas replied that she thought he had promised her that she would not have to work on week ends anymore because of the long hours she had been putting in. Mr. Kirkman then stated that working on alternate Sundays was the best that he could do at that time, and he told her she could either work on alternate Sundays, or "that's it." Ms. Douglas interpreted this conversation to mean that she was fired, and she left her job that same day on May 28, 1975. However, Ms. Douglas further testified by deposition that working on Sundays was only "part of it," and that she left partly because she was not made

kitchen supervisor."

The trial court in its opinion then found that Respondent did, in fact, make several good faith attempts to accommodate Petitioner and to force Petitioner to further efforts would impose "more than a de minimis cost", which Title VII does not require. Hardison, supra; Jordan, supra.

The court stated:

> A review of the evidence presented at trial shows that Travelers Inns did, in fact, make good faith efforts to reasonably accommodate Ms. Douglas' religious beliefs. Due to the recent loss and shortage of employees at Travelers Inns, the seven-day-a-week operation of the hotel and restaurant and the necessary compliance with the

recently-enacted wage and hour laws, Travelers Inns had to make accommodations with the available qualified personnel in order to make the shifts equal for all employees. As the only first cook available, Ms. Douglas initially agreed to this arrangement, and she voluntarily worked on two Sundays. In a further effort to accommodate Ms. Douglas, Travelers Inn hired another cook, Ms. Louise Carson, to work on alternate Sundays with Ms. Douglas until another cook could be hired to replace her. Despite this temporary restructuring of the work schedule, Ms. Douglas interpreted such arrangements to mean that she was discharged. In actuality, however, Travelers Inns was making a good faith effort to accommodate Ms. Douglas' religious beliefs, and her unreasonable interpretation of the accommodation process to mean that she was forced to resign finds no basis or support from the evidence. See Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977). See also Chrysler Corp. v. Mann, 561 F. 2d 1282 (8th Cir.

1977), cert. denied, 434 U.S. 1029 (1978).

Moreover, to require further accommodation action on the part of Travelers Inns would constitute an undue hardship on its business. Travelers Inns had satisfactorily shown that it attempted in good faith to make reasonable accommodations for Ms. Douglas' religious beliefs, even to the extent of hiring one and seeking another additional replacement cook, and further accommodation would create an undue hardship where limited numbers of employees at the plaintiff's position were available. See, Johnson v. U.S. Postal Service, 497 F. 2d 128 (5th Cir. 1974), Olds v. Tennessee Paper Mills, Inc. 11 FEP 350, 352 (E.D. Tenn, 1974), aff'd mem., 524 F. 2d 1405 (6th Cir. 1975); Dixon v. Omaha Public Power District, 385 F. Supp. 1382 (D.Neb. 1974). If Travelers Inns were required to strictly abide by the plaintiff's demands, it would create extra expense to accommodate not only Ms. Douglas, but any other employee who might be affected

by such a concession. And, where an accommodation would impose more than a de minimis cost in lost efficiency, or which would be an imposition on co-workers tantamount to reverse discrimination against them, an undue hardship would lie. Hardison, 432 U.S. at 78-85. Lastly, Travelers Inns' past practice of accommodating Ms. Douglas' religious beliefs for over two and one-half years further supports a finding of undue hardship where the evidence revealed that Ms. Douglas left her employment despite Travelers Inns' earnest efforts to locate another employee to excuse her from further Sunday labor. Id. at 68. See also Huston v. United Auto Workers, Local 93, 559 F. 2d 477 (8th Cir. 1977); Ferguson v. Kroger Co., 16 FEP 733 (S.E. Ohio 1978). It follows, therefore, that Ms. Douglas was not wrongfully discharged from her employment as stated in 42 U..C. Section 2000e-2 (a) (1).

Petition pp 40a-43a

(b) Other Circuits:

Comparing the approach taken by the district court below, and affirmed per curiam by the Fourth Circuit, to the decisions of the Third, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits leads one to the inescapable conclusion that all Circuits interpret the Hardison guidelines exactly the same way and that there is not, as Petitioner suggests, any conflict between the Federal Circuits.

Each case turns on its own facts and a factual finding by a trial court that "reasonable accommodation" has or has not been attempted

should not be overturned unless clearly erroneous. Hardison, supra; Yott, supra; Nottelson, supra.

A survey of the cases cited by Petitioner and several later cases indicates that the factual situations involved fall into two categories. First, the plaintiff refused to pay union dues or join a union due to conflicts with his or her religious beliefs. Second, the plaintiff refused to work certain hours which conflict with his or her religious beliefs.

The employee's actions in the first category uniformly is held to

be protected under Section 701(j) of Title VII. In these cases, the Courts rarely find evidence of any accommodation by the Union or the employer whatsoever. Furthermore, it is usually found that the employee was willing to contribute the same amount as the dues to a charity to be named by the union or the employer. With no attempt to accommodate by the union or the employer, the Courts have quickly found that a violation of Section 701(j) has occurred. These cases include: McDaniel vs. Essex International, Inc., 696 F. 2d 34 (6th Cir. 1982); Nottelson vs. Smith Steelworkers, 643 F. 2d 445 (7th

Cir. 1981), Yott vs. North American Rockwell Corp., 602 F. 2d 904 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980); Burns vs. Southern Pacific Trans. Co.; 589 F. 2d 403 (9th Cir. 1978), cert. denied, 99 S.Ct. 843 (1979); Tolley vs. Martin-Marietta Corp., 648 F. 2d 1239 (9th Cir. 1981); Anderson vs. General Dynamics Convair Aerospace Division, 589 F. 2d 397 (9th Cir. 1978).

Petitioner has cited several of these cases as a basis for her conclusion that a conflict exists between the circuits. The cases cited above are factually distinguishable from Jordan and the case

sub judice: there will rarely exist any hardship on an employer or a union which would excuse an accommodation falling in the first category. By definition, therefore, a union dues situation will not involve actual evidence of such hardship and may become at some point a per se violation of Section 701(j). The instant case however, involves a refusal to work, which falls in the second category, which as is discussed below, is a different situation altogether. The problems inherent with a refusal to work case are not present in a union dues case, and the results oftentimes sharply differ between the two

types of cases.

The second category, i.e. refusal to work at certain times in conflict with religious beliefs, oftentimes presents the court with a much harder question involving undue hardship to the employer. Our case falls into this category as does Hardison. In these cases, the court often finds that the employer has attempted to accommodate the employee and the results usually depend on the factual determination of whether the employer would have to incur "more than a de minimis cost" as stated in Hardison.

In Ward vs. Allegheny Ludlum Steel Corp., 560 F. 2d 579 (3d Cir. 1977), plaintiff contended that the employer could use substitutes to replace him while he was absent from work. Pursuant to Hardison, the court remanded the case to the district court for a factual determination of whether the necessity of overtime pay for substitutes would constitute undue hardship for the employer. Compare, Neiderhuber and Brown, infra.

In Neiderhuber vs. Camden County Vocational Tech. School, 495 F. Supp. 273 (D.N.J.) aff'd without opinion, 671 F. 2d 496 (3d Cir.

1980), the plaintiff requested that he be allowed to miss occassional days of school in order to observe religious holidays (5-10 days a year). The court found that ample substitute teachers were available at no extra cost to the school system and therefore no undue hardship was present.

In Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977) (discussed above), the court found that plaintiff preempted defendant Bank from any attempts to accommodate her religious beliefs by refusing to work for Bank at all unless a blanket guar-

antee was given that she would not have to work on Saturdays.

Petitioner cites Cummins vs. Parker Seal Co., 516 F. 2d 544 (6th Cir. 1975) affirmed by equally divided court, 429 U.S. 65 (1976) for her contention that a conflict exists between the circuits. Respondent notes that this is a pre-Hardison case construing EEOC Reg. 29 C.F.R. §1605.1 (1974). Hardison noted the problems the courts were having with construing "undue hardship", including the Sixth Circuit. Hardison 432 U.S. at 75, note 10 (citing Cummins). Respondent contends that this pro-

blem was resolved by the Hardison decision. However, the Cummins court did find that the sole evidence of some complaints by other employees did not constitute "undue hardship" on the employer.

Petitioner also cites Draper vs. United States Pipe and Foundry Co., 527 F. 2d 515 (6th Cir. 1975), for the proposition that a conflict exists after Hardison. Again, Respondent notes that Draper and Cummins were resolved by the Hardison opinion. Hardison, 432 U.S. at 75, note 10.

Petitioner further cites Redmond

vs. GAF Corp., 574 F. 2d 897 (7th Cir. 1978) for the proposition that an employer must prove actual "undue hardship" and therefore conflicts with the Fourth Circuit. This is an incorrect reading of that case. The Court found that the employer failed to make any accommodation of the employee's request not to work. Id. at 903. It further noted that although the trial court did not have the benefit of the guidelines of Hardison, the record did not disclose that its finding of no "undue hardship" was "clearly erroneous". The court clearly applied the Hardison guidelines in exactly the same fashion as the trial court

in the instant case and Respondent submits that these circuits are in accord.

Petitioner cites Brown vs. General Motors Corporation 601 F. 2d 956 (8th Cir. 1979) for the proposition that the Fourth and the Eighth Circuits conflict on the de minimis issue. In that case the district court found that

> "sufficient members of substantially qualitied workers were available without any additional costs in wages or overtime."

601 F. 2d at 959.

The district court further found

that there was no lost efficiency nor were there any conflicts with the company's collective bargaining agreement. Hence, the Eighth Circuit quite properly reversed the District Court's finding of "more than de minimis cost". Tne court circuit went on to say that where, as in that case, the employer attempts accommodation and finds no additional costs, theoretical evidence will not suffice to prove undue hardship. Citing Draper, supra, the court stated:

> [w]e are somewhat sceptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on

> stronger ground when he has attempted various methods of accommodation and can point to hardship that actually resulted. (Emphasis Added)

601 F. 2d at 960. Respondent submits that it has achieved the "stronger ground" as was specifically found by the trial court below. The only difference between this case and Brown therefore, is a factual one.

While the petitioner failed to cite any "refusal to work" cases for the Ninth Circuit, Bhatia vs. Chevron U.S.A., Inc. 734 F. 2d 1382 (9th Cir. 1984) indicates that the Ninth Circuit follows the same standards as the Fourth Circuit in

analyzing "undue hardship". In that case, plaintiff refused to shave facial hair for religious reasons. His job required that he wear a gas mask with a proper seal which required the employee to be clean shaven. Not to wear such a mask would result in potential employer liability under the California Occupational Safety and Health Act. The employer attempted to find plaintiff another job and offered him four different positions at similar pay. The plaintiff rejected these accommodations. The court stated:

> Chevron has established that if it were to retain Bhatia as

> a machinist and assign him to duties involving exposure to toxic gas, it would risk liability for violating California Occupational Safety and Health Administration standards. If, on the other hand, it retained him as a machinist and directed his supervisors to assign Bhatia to only such duties as involved no exposure to toxic gas, the burden would be twofold. First, Chevron would have to revamp its currently unpredictable system of duty assignments to accommodate the need for predicting whether particular assignments involved potential exposure to toxic gases. Second, Bhatia's co-workers would be required to assume his share of potentially hazardous work. Title VII does not require Chevron to go so far.

Id at p. 1384.

Finally, Petitioner asserts that the District of Columbia and the Fourth Circuits are in conflict, citing Haring vs. Blumenthal, 471 F.

Supp. 1172 (D.D.C. 1979), cert. denied 452 U.S. 939 (1981), reh. denied 453 U.S. 927 (1981). This is not exactly a "refusal to work" case. Plaintiff was an IRS employee who refused to work on certain cases, e.g. tax-exemption determinations because of his religious beliefs. The IRS proposed several "public policy" defenses to his religious discrimination suit which the Court found not to be evidence of any undue hardship. The only relevant assertion made by the IRS was the assumption that, should the IRS accommodate the plaintiff's requests in one situation; "it may well be that undue difficulties will

arise if others were to assert the same or similar rights". Id at p. 1181. The court apparently took the same approach as that taken in Brown, supra and in Niederhuber, supra and found no evidence of accommodation or of undue hardship. At any rate, Haring is factually distinguishable from our case. In the case sub judice the district court found evidence of present undue hardship, as that term was discussed in Haring, at p 1182. Simply put, the only difference between Haring and this case is the evidence presented at trial.

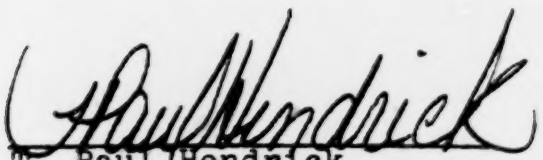
In summary, each case under

Section 701(j) of Title VII of the Civil Rights Act turns on its own set of facts. Hardison, supra; Redmon, supra. It is clear that the Fourth Circuit follows precisely the same legal approach to these cases as the circuits cited by Petitioner. The conflict proposed by Petitioner is an illusory one, resulting from different factual situations. If the case below had been decided differently, Petitioner would more than likely agree that there is no conflict between the Circuits. In fact, the only complaint of Petitioner is the result of her lawsuit, not in the legal analysis that led to it.

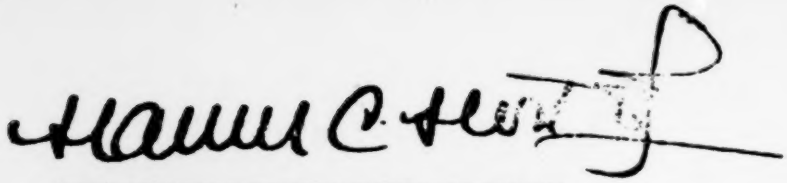
Conclusion

Based on the authorities and arguments set forth above, Respondent, Travelers Inns of North Wilkesboro, Inc. d/b/a Holiday Inn of Wilkesboro, respectfully prays that the Petition for Writ of Certiorari be denied.

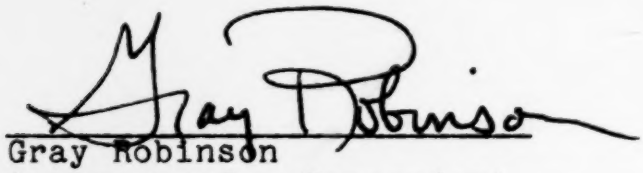
This 27th day of August, 1985.



T. Paul Hendrick



Hamilton C. Horton, Jr.



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CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 27th day of August mailed the required copies of the Brief in Opposition to the Petition for Writ of Certiorari to the

Clerk's office of the Supreme Court of the United States for the purpose of filing the same on August 27, 1985 and have also mailed the required copies of the above-mentioned document to all attorneys of record as follows:

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